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GENDER DISCRIMINATION AGAINST REFUGEES

I. Introduction:

In 1951, the United Nations established a multilateral treaty known as the *Convention Relating to the Status of Refugees*, which set out certain basic guidelines on the eligibility of individuals claiming refugee status, rules relating to the process of granting asylum, rights of refugees and the obligations of nations granting asylum (hereinafter referred to as the 1951 Convention).¹ The 1951 Convention further builds on the Universal Declaration of Human Rights of 1948 (UDHR), which codifies customary international law and recognizes the right of all persons to seek asylum from persecution in other countries. Article 7 of the UDHR also states that everyone is entitled to its rights and freedoms without discrimination of any kind, including gender discrimination.² The UDHR also ensures that men and women have equal rights in marriage, and that everyone has the right to own property, the right to work and free choice of employment, and the right to education.

However, there is still criticism of international law today because despite the apparent neutrality of the law and its interpretations, women are still discriminated against, stereotyped and unfairly disadvantaged. For example, the 1951 Convention does not recognize gender as a ground of persecution under which individuals can claim refugee status. Although women suffer similar forms of persecution like men,

¹ United Nations, Treaty Series, Vol. 189, p. 137

² Women's Commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, May 2002

e.g. torture, unlawful detention etc., in addition, there are other forms of gender related persecution such as sexual assault and rape that are unique to women simply because they are women.³ In order to better understand this problem, it is important to note that the term 'gender' is often erroneously used synonymously with the term 'sex' – which is biologically defined, while gender refers to the social organization of sexual difference or rather, the construction of power relations between women and men.⁴ Gender differences and relations change with the historic, cultural and geographic context of the situation – meaning that the experience of being a man or a woman changes with time and place. The UNHRC has also further clarified that gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender related claims therefore, may be brought by either men or women - although due to particular types of persecution, they are more commonly brought by women.⁵ Thus, if the goal of the international community is to create fair and effective refugee laws which apply equally to all human beings - it becomes extremely important to understand the specific way in which gender (versus just sex, which is biological) influences the life and circumstances of a refugee.⁶

For this reason, many jurists argue that Article 1A(2) of the 1951 Convention should be extended to include women suffering from gender specific persecution such

³ Eva Nilsson, *Persecution on Account of One's Gender: Refugee Status or Status Quo?*, *feminists@law Journal*, University of Kent, Vol 2, No.1 (2012), p.16, available online at: <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/56>

⁴ Refugee Women's Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK*, July 1998, at p. 8

⁵ UNHCR Guidelines for Prevention and Response, *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons*, May 2003, pp. 109-111, available online at: <http://www.unhcr.org/3f696bcc4.pdf>

⁶ *Ibid.*

as human trafficking, rape and other sexual assaults, unique to her social and geographic context. According to Article 1A(2) of the 1951 Convention, the term ‘Refugee’ applies to any person who: *“owing to a well-founded fear of being persecuted for the reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside his country of origin and is unable or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”*⁷

This definition establishes five grounds of persecution – race, religion, nationality, membership in a particular social group, or on the basis of holding a political opinion. Even though women and children form over 80% of the total number of displaced persons in the world, it is still the case that in the determination process, male applicants seeking asylum are significantly more successful in obtaining refugee status.⁸ While there is nothing explicit that precludes women from being recognized as refugees, the way member states have interpreted these instruments still reinforces and reflects gender biases. The standard adopted by the law, though it may prima facie appear to be entirely gender neutral, continues to disadvantage women by not taking

⁷ *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Reissued in Geneva, December 2011, at p. 46, available online at: <http://www.unhcr.org/en-us/publications/legal/3d58e13b4/handbook-procedures-criteria-determining-refugee-status-under-1951-convention.html>

⁸ Eileen Pittaway & Linda Bartolomei, *Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women*, Canada’s Journal on Refugees, Vol. 31, No. 2 (2015), pp. 21 – 22, available online at: <http://refuge.journals.yorku.ca/index.php/refuge/article/view/40316/36358>

into account their special circumstances. I have analyzed below some of the significant ways in which the application of the 1951 Convention unfairly affects women, and how member states have attempted to remedy this situation through interpretation and domestic legislation.

II. Differences in Persecution

Public forms of persecution, like civil and political harms, are more likely to affect men, and have therefore historically been the primary focus of refugee protections, and of human rights more broadly. Harms that are more likely to occur in the private sphere – like gender specific violence, rape, sexual assault and human trafficking are much more likely to affect women and have therefore been excluded from the realm of violations that earn an individual refugee status.⁹ Further, the traditional view of a refugee is that of a male activist, persecuted or displaced as a result of his political actions against the State.¹⁰ While the 1951 Convention was not necessarily drafted with the intention of distinguishing between male and female refugees, even in practice, it has failed to address these forms of persecution that are gender specific.

Given this background, the Office of the United Nations High Commissioner for Refugees (UNHCR)'s Executive Committee encouraged member states party to

⁹ Martina Pomeroy, *Left Out in the Cold: Tracking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement*, 16 Mich. J. Gender & L. 453 (2010), available online at: <http://repository.law.umich.edu/mjgl/vol16/iss2/3>

¹⁰ *Ibid.*

the 1951 Convention to adopt guidelines recognizing claims by women who faced private discrimination on the basis of gender: *“In accordance with the principle that women’s rights are human rights, these guidelines should recognize as refugees, women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or other gender-related persecution.”*¹¹ It has been argued that the current framework fails to protect women who need specialized protection from types of harms that are particular to their gender - including but not limited to rape, sexual assault, dowry related bride burning, female genital mutilation, forced marriage, domestic violence, forced abortion, female infanticide etc.¹² Additionally, in many countries today, women are also not adequately protected from the harms of living in a male dominated society, in which many of their fundamental rights have been denied to them.¹³

Many international law jurists have argued that women suffer particular forms of oppression solely because they are women, completely independent from their political opinion or ethnicity. The situation today in many middle-eastern countries like Syria reflects this reality. Given that the 1951 Convention does not attempt to bring this type of persecution within its ambit is evidence that it was developed from a male paradigm since it more accurately reflects male applicant’s factual situation. As a

¹¹ U.N. High Comm'r for Refugees, Executive Comm., *General Conclusion on International Protection*, No. 77 (XLVI) (October, 1995), available online at: <http://www.unhcr.org/en-us/excom/exconc/3ae68c438/general-conclusion-international-protection.html>

¹² Nancy Kelly, *Guidelines for Women's Asylum Claims*, Int J. of Refugee Law, Oxford University Press (1994), Vol. 6, pp. 517-534

¹³ *Ibid.*

response to this criticism, the UNHCR has recommended that member states develop specialized procedures for the determination of women's refugee status, and that asylum-seekers who may have suffered sexual violence be treated with particular sensitivity, recognizing that women refugees often experience persecution differently than men.¹⁴

Rape and other forms of sexual violence which women are subject to can often be motivated by political reasons – and has occurred in parallel with genocide in many areas of armed conflict. For example, the 'ethnic cleaning' carried out in the territory of the former Yugoslavia, where specific forms of violence were used against women as a means of interrogation.¹⁵ Government officers or opposition militants could also commit these crimes against civilian women as part of a larger strategy to terrorize the population. Thus, in these situations the harm itself may have been intended for the males in the community through raping or sexually assaulting their women, but the injuries are internalized by women victims because they are required to bear the physical consequences in addition to dealing with the social stigma that usually follows these types of crimes.¹⁶ However, women detained for non-political reasons are also just as frequently subject to rape or sexual assault – and when it is state actors who are carrying out these acts, it seems appropriate that this would rise to the level of persecution against women, under which they should be able to claim refugee status.

¹⁴ UNHCR Guidelines for Prevention and Response, Supra n. 5, pp. 109-111

¹⁵ Christine Chinkin, *Rape and Sexual Abuse of Women in International law*, Symposium on the Yugoslav Crisis: New International Law Issues, European J. of Int. Law, Vol.5 (1994) p. 329, available online at: <http://www.ejil.org/pdfs/5/1/1246.pdf>

¹⁶ *Ibid.*

III. Women as a 'Social Group'

In 1986, five Iranian nationals, one of whom was a woman, sought political asylum in the Federal Republic of Germany, and the woman claimed that she was subject to special reprisals because of her sex. The Federal Office granted the applicants asylum because of their well-founded fear of persecution due to their political activities.¹⁷ In addition, the woman was found to have belonged to a specific social group of Iranian women, who were subject to persecution specific to that group. The Office held that “*the ideologically based power of men over women, results in a general political repression of women and children in defiance of their individual liberties and human rights.*”¹⁸ In a similar case in the United Kingdom, the court denied asylum based on the ‘social group’ category even though it recognized that women and children could be protected under it. The way the court applied the law clearly indicates the problem of protecting persecuted women as a social group rather than recognizing gender as a basis of persecution. In this case, an Iranian woman sought asylum in the UK based on the basis of her position as a woman in Iran. Her application was denied. One of the conclusions of the Appeal Tribunal was that the ‘social group’ provision means membership in a group that can be identified and has

¹⁷ A. Johnsson, *The International Protection of Women Refugees: A Summary of Principal Problems and Issues*, Int J Refugee Law, Vol. 1 (1989), p. 221-232

¹⁸ Women's Commission for Refugee Women and Children, *UNHCR Policy on Refugee Women and Guidelines on Their Protection: An Assessment of Ten Years of Implementation*, May 2002, available online at: <http://www.refworld.org/pdfid/48aa83220.pdf>

common practices or beliefs, but that there was no evidence that Iranian women and children considered themselves a social group separate from other Iranians.¹⁹

The United States courts have agreed with such a narrow reading of the term and have likewise made it difficult for women to rely on this category to flee gender based persecution. The Ninth Circuit has developed a test for what constitutes a social group in the decision *Sanchez-Trujillo v. INS*,²⁰ where the court stated: “*The phrase ‘particular social group’ implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.*” Further, the court also observed that such an all-encompassing grouping as the petitioners were trying to fit themselves into was not the type of cohesive, homogeneous group, which would come under the term ‘particular social group’.

The Second Circuit subsequently relied on this definition to deny a Salvadorian woman refugee status. In *Gomez v. INS*,²¹ a woman sought asylum because she had been repeatedly battered and raped by Salvadorian guerrillas. She claimed that because of these attacks she became a member of a social group singled out for persecution in El Salvador. However, the court held that she failed to produce evidence that women

¹⁹ *ZH (Women as Particular Social Group) Iran CG*, [2003] UKIAT 00207, available online at: <http://tribunalsdecisions.service.gov.uk/utiac/38547>

²⁰ *Sanchez-Trujillo, et al., v. Immigration and Naturalization Service*, 801 F.2d 1571 (9th Cir. 1986)

²¹ *Gomez v. Immigration and Naturalization Service*, 947 F.2d 660 (2nd Cir. 1991)

who have previously been abused by the guerrillas possess certain common characteristics other than gender and youth, such that persecutors could identify them as members of the purported group. In other cases however, US courts have granted political asylum to male refugees who claimed persecution in their countries on the basis of sexual orientation. Since the state was unable to protect its citizens from abuse and rape which they were subjected to as a result of their sexual orientation, courts found that refugees in these cases possessed a well-founded fear of persecution because there has been culture of severe discrimination against homosexuals that existed in their home countries. Thus, because homosexuals were the victims of targeted violence on account of their sexual orientation, they were recognized as a ‘social group’ and received asylum under the Immigration and Nationality Act, 1965 (INA).²²

Under the UNHCR guidelines, the category of ‘membership of a particular social group’ cannot be interpreted as to render the other Convention grounds superfluous or as a catchall provision applying to all persons fearing persecution. According to the guidelines, a social group cannot be defined exclusively by the fact that it is targeted for persecution.²³ There is also no closed list of what groups may constitute a particular social group. Rather, the phrase ‘membership of a particular social group’ should be read in an evolutionary manner, open to the diverse and

²² *Bromsfield v. Mukasey*, 543 F.3d 1071 (9th Cir. 2008)

²³ UNHCR Guidelines on International Protection, *Membership of a particular social group within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, May, 2002

changing nature of groups in various societies and evolving norms of international humanitarian law.²⁴

As an alternative to obtaining refugee status as a social group, persecuted women could try to seek protection under the political opinion or religion category – which has been discussed below. However in this context, it is important to note that a woman's refusal to abide by the traditions of her country is often not based on any political opinion or religious belief she may hold. Rather, it may be based on her personal distaste for that particular tradition, for which the State may punish her without any consequences under International law.²⁵

Now however, the international community is beginning to recognize the need for broadening the definition of refugee to include those fleeing gender-based persecution. In April 1984, the European Parliament adopted a resolution, which called on states to recognize the right of women in certain countries who face harsh or inhuman treatment because they are considered to have transgressed the social norms of the country in which they live to be considered a “social group” within the meaning of the 1951 Convention.²⁶

The inconsistent use of the social group category by member countries, as indicated by these cases, is the result of the UNHCR's failure to define it in precise

²⁴ *Ibid.*

²⁵ P. Tuitt, *False Images: Law's Construction of the Refugee* (Pluto Press, 1996), 24-45; S. Kneebone, *Moving Beyond the State: Refugees, Accountability and Protection*, *The Refugee Convention 50 Years On: Globalization and International Law* (2003), p. 279-311

²⁶ UNHCR Guidelines for Prevention and Response, Supra n. 5, at p. 109

terms. Judges and practitioners who attempt to define or apply it consider factors such as ethnic, cultural, and linguistic origin, education, family background, economic activity, shared values, outlook, and aspirations. Another important factor they take into account is the attitude of the State toward the purported social group and how they have been disadvantaged as a result of failing to receive state protection.²⁷ However, in the countries discussed above, women and children do not seem to be perceived of by their governments or the rest of society as a distinct cohesive group with common beliefs and practices – which could explain why they are not automatically recognized as a separate social group under the 1951 Convention.

IV. 'Political Opinion' in the context of Gender Specific Crimes

However, although gender-related persecution like rape and other sexual assault are being accepted as a valid ground for persecution in Canada and the US, women victims of these crimes still face difficulties in producing the appropriate evidence, as they are also required to prove that there was a failure of the state to adequately protect them.²⁸ The biggest challenge faced by women in this regard is that claims of rape, sexual assault or other gendered crimes can only be made on at least one of the five grounds of the Convention. Currently, the two most frequently used grounds are the 'social group' category and 'political opinion.'²⁹

²⁷ Supra n. 8, at p. 23

²⁸ James Hathaway, *The Rights of Refugees under International Law*, 1st ed. 2005, at p. 421

²⁹ *Ibid.*

Although cases in the United States have laid down a rather broad definition of political opinion, women still face significant difficulty in bringing their claims under this ground because they are usually not directly involved in political activities.³⁰ Courts have held that women have the burden of showing the nexus between their political opinion and the fear of gender-related persecution, and also that the state is unable or unwilling to protect them.³¹ As a result, women are still less successful since most rape and sexual violence have no connection to their political opinion, and many of those who suffer such persecution are not publicly involved in politics.³² Generally, while women are less likely than men to be involved in high profile political activities, it has been found that they are more often integral in carrying out 'low level' political activities that comprise of private activities like - providing food, clothing, medical care, pass messages from political activists or hiding people.³³ This is because in some societies, overt demonstrations of political opinion by women may not be permissible, as women are not even allowed to formally participate in the political life of the community.

³⁰ As seen in the case of *Sofia Campos-Guardado v. INS*, 809 F.2d 285, (5th Cir. 1987), where a woman was asserting that: (i) she was persecuted in El Salvador for political opinions attributed to her by her assailants on account of her family membership; and (ii) that she would be subject to future persecution if deported back to El Salvador. The Court in this case held that these threats of reprisal were personally motivated, and that there was no indication that the perpetrator maintained an interest in her because of her political opinion.

³¹ *Ibid.*

³² Heaven Crawley & Trine Lester, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, UNHCR's Evaluation and Policy Analysis Unit, May 2004, at p. 68, available online at: <http://www.unhcr.org/40c071354.pdf>

³³ *Ibid.*

Because of this reason, it has been argued that a woman's challenge of the particular social conventions that govern her, and her being sexually assaulted as a result should be considered persecution on the basis of her 'political opinion.'³⁴ Further, questions regarding whether a woman is free to wear a veil or not, to be subject to genital mutilation, to exercise her right to education, or to be free from male violence are essentially about demarcating private rights from the public sphere. Any conflicts concerning these private rights are acts of political resistance, and that is how they should be considered when evaluating women's claims for refugee status.³⁵ Some courts have applied this broad definition with more success, like the Fifth Circuit, in *Coriolan v. INS*, overruled the opinion of the Board of Immigration Appeals (BIA), which held that people without overt political activity are unlikely to be victims of persecution. The court further held that "*citizens can be the focus of government persecution without ever taking any conventionally political action at all.*"³⁶

In another case, the Ninth Circuit held that a perpetrator of sexual assault had imputed political opinion onto his victim, Ms. Lazo-Majano. He believed that because she was a woman - she belonged to a class of persons that he could dominate or suppress. The perpetrator warned the victim that since he was an army officer, no authorities would get involved, and that he could legally have her tortured and killed if she attempted to seek protection from the State. Therefore, her resistance against these crimes was considered to be a political act based on the opinion that women are to be

³⁴ Maureen Mulligan, *Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion*, 10 B.C. Third World L.J. 355 (1990), pp. 374-376 available online at: <http://lawdigitalcommons.bc.edu/twlj/vol10/iss2/6>

³⁵ Supra n. 32, at p. 74

³⁶ *Coriolan v. INS*, 559 F.2d 993 (5th Cir. 1977), at p. 1001

treated equally and with basic dignity.³⁷ However, since this case directly contradicts the Fifth Circuit case of *Sofia Campos-Guardado v. INS*, there is currently a conflict among the Circuit Courts as to whether rape creates a well-founded fear of persecution on account of political opinion.³⁸

V. Conclusion - The Move toward a Broader Definition?

In 1995, the INS issued new guidelines (INS Guidelines) for evaluating women's asylum claims based entirely or in part on their gender. These INS guidelines, which formally recognized gender-based persecution as a potential ground for asylum, expanded the definition of 'refugee' by including those fleeing gender-based persecution.³⁹ The INS guidelines state that the determination that sexual abuse may be serious enough to amount to persecution does not by itself make out a claim for asylum.⁴⁰ The applicant are still required to demonstrate that they have been persecuted or have a well-founded fear of persecution on account of one of the five protected grounds under the 1951 Convention.⁴¹ To establish persecution, it is required that the applicant prove that the harm was inflicted by government agents or alternatively, by a non-government entity that the state is unable or unwilling to control.⁴² As we seen from the cases above, many claims involving instances of rape

³⁷ *Olimpia Lazo-Majano v. INS*, 813 F.2d 1432, 1433 (9th Cir. 1987)

³⁸ *Supra* n. 34, at p. 357

³⁹ Memorandum from Phyllis Coven, Office of International Affairs, to Immigration and Naturalization Service Asylum Officers, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*, May 1995, available online at: <https://www.state.gov/s/l/65633.htm>

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² *Ibid.*

or sexual abuse, tend to lack an identifiable state actor or group, which complicates this process for women refugees.

The INS guidelines are an attempt to clarify the distinction between public and private acts. In a usual case, the government will be the alleged perpetrator of the crimes. But however, in cases against women – questions frequently arise regarding whether an act committed or threatened by a government official was nevertheless a purely private one.⁴³ Such cases may also involve public officials who commit what is socially considered to be a private act. The guidelines provide that in these situations adjudicators are required to determine whether there is a reasonable basis for regarding the act in question as a ‘public’ act, which can then be attributed to the government or even to an agent that the government is unable or unwilling to control. Consequently, applicants must frame private acts such as rape or sexual abuse in the language of the public sphere.⁴⁴ However, in some cases the persecutor may not be a government actor and in these cases, the burden is still on the petitioner to show that the state is unable or unwilling to protect its citizens from these kinds of harms.

In the case of *Klawitter v. INS*, the Sixth Circuit denied political asylum to a Polish woman who had been blacklisted for refusing to join the Communist Party and was subsequently sexually assaulted by a colonel in the Polish secret police.⁴⁵ The court held that the colonel’s actions were motivated by personal desire, rather than

⁴³ Lucy Akinyi Orinda, *Securing Gender-Based Persecution Claims: A Proposed Amendment to Asylum Law*, 17 Wm. & Mary J. Women & L. 665 (2011), p. 677, available online at: <http://scholarship.law.wm.edu/wmjowl/vol17/iss3/7>

⁴⁴ *Ibid.*

⁴⁵ *Klawitter v. INS*, 970 F.2d 149, (6th Cir. 1992)

from any interest on his part to persecute her.⁴⁶ This decision highlights the distinction courts place between acts that are considered ‘public’ versus ‘private’, and also reveals the inconsistent nature of the outcomes of refugee claim cases. In drawing these lines, acts found to be within the private sphere - such as sexual offenses are often not seen as persecution. It has been argued that such cases reflect the lack of a cohesive framework within which to evaluate the gender-related claims of women.⁴⁷ Although each of the cases discussed above have raised either a claim based on ‘political opinion’ or a ‘social group’ argument, US courts have made disparate determinations of when persecution under either of these categories existed.

Although the INS Guidelines have achieved a greater degree of protection for women refugees, there remains a lack of predictability in the adjudication of gender-based asylum claims. By specifically recognizing these harms as forms of persecution, adjudicators appear to no longer have the power to determine whether one act of rape is sufficient to qualify as ‘persecution’.⁴⁸ These decisions demonstrate that the standards employed to evaluate asylum claims have been applied inconsistently, and have thus created a system that lacks cohesion and predictability. In the context of gender-based persecution claims, the lack of guidance on what definitively constitutes “persecution” has left the term open to different levels of interpretation. It has been argued that the basis for success on any asylum claim is affected not only by which particular immigration judge the case has been assigned to, but also by various other

⁴⁶ *Ibid.*

⁴⁷ Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, Cornell Int’l Law Journal, Vol. 26 (1993), at p. 625

⁴⁸ *Supra* n. 43, at p. 686

factors like the gender and political views of the judge, past work experience etc.⁴⁹ In conclusion, I think creating a more uniform system by removing the requirement of certain grave crimes committed in the personal sphere (like rape, sexual assault or female genital mutilation) from qualifying under one of the five categories from the 1951 Convention might ensure more favorable treatment toward women refugees and prevent gender based discrimination.

⁴⁹ *Ibid*, at. 682